IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.4477 OF 2006

M/s.Satellite Developers Pvt. Ltd. and ors. ..Applicants

Vs.

The State of Maharashtra and anr. ..Respondents

Mr.Shirish Gupte, Senior Counsel with Mr.Rajiv Patil
i/by M/s.Pirani and Co. for applicants.
Mr. D.R.More, APP for State.
Mr. R.P. Walwaikar for respondent no.2.
Mr.Paretosh i/b. M/s.Purnanand & Co. for Resp.No.3.

CORAM: B.H. MARLAPALLE,J.

Reserved on : September 18, 2007.

Pronounced on : December 06, 2007.

ORDER :

1. In this application filed under Section 482 of Cr.P.C. the applicants are praying for quashing of the proceedings in C.C.No.97/SS/2006 presently pending before the learned Special Metropolitan Magistrate, 49th Court at Vikhroli, Mumbai. In the said case process was issued on 21/3/2006 under Section 13(1) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and the said order was challenged in Criminal Revision Application No.985 of 2006 but

the revision came to be dismissed on 14/11/2006.

2. The applicant no.1 is a Private Limited Company registered under the Companies Act, 1956 and applicant nos.2 and 3 are its Directors. The applicant no.1 company was also known as Jasmine Builders Pvt. Ltd. The respondent no.3 is the Co-operative Society registered under the Maharashtra Co-operative Societies Act, 1960 on 27/2/1996 and respondent nos.2 and 4 are its members. On 11/7/1978 Bai Kabibai and Hansraj Morarji Trust (for short referred to as "the Trust") entered into an agreement with M/s. Jasmine Builders Pvt. Ltd. (for short "Jasmine") to grant lease of land with sanitarium bungalows etc. standing thereon and admeasuring 5625 sq.mtrs. bearing City Survey Nos.5290 to 5320 at Ghatkopar, Mumbai for a term of 50 years with an option to renew the lease for further 45 years on rent. The said property was originally acquired by one Hansraj Morarji under a Deed of Conveyance dated 16th August, 1906. By an order dated 19/11/1977 the Charity Commissioner, Maharashtra State had approved grant of lease of the said property to Jasmine. By an agreement for sale dated 28/9/1985 between the Trust

and Jasmine, the Trustees agreed to sell to Jasmine the said property and the Trust also applied to the Charity Commissioner for obtaining his sanction for sale of the said property. By further agreement dated 30/7/1988 executed between the Trust and Jasmine, it was inter alia, recorded that portions of a structure on the said property admeasuring about 850 sq.ft. built up area was required to be demolished for the purpose of road widening and hence Jasmine paid to the Trustees additional consideration in lieu of being entitled to use of extra FSI. By Supplemental Agreement dated 2nd August, 1988 between the Trust and Jasmine, it was agreed between the parties that the conveyance area was more than the said property recorded in the agreement dated 28th September 1985. As a result thereof Jasmine agreed to pay to the Trust additional consideration amount. By an order dated 10/2/1989, the Charity Commissioner approved the sale of the property for a final consideration of Rs.53,75,000/-. Jasmine demolished some of the structures on the said property and developed a portion of the property by constructing a multi-storeyed building by name "Gayatridham" and sold on ownership basis the flats and shops in the said

building. Remaining structures on the said property were occupied by tenants, occupants, deemed tenants. Jasmine was amalgamated with the present applicant no.1 as per the order passed by this Court in Company Petition Nos.53 and 122 of 1999. By a Deed of Conveyance dated 22/4/2003 the property was sold to the applicant no.1 - company and the details of the property mentioned were as under,

> "All that piece or parcel of land or ground with the messuages, sanatorium, Bungalows, etc. standing thereon bearing City Survey Nos.5290 to 5320 situated at Ghatkopar, Mumbai - 400 077 on the Eastern side of the main road previously in the Registration Sub-District Salsette, now Taluka Kurla-1, Registration District Mumbai Suburban, admeasuring 6287.90 square meters as per the property registry cards."

3. In the mean while completion certificate of the multi-storeyed building was issued on 3/9/1989. However Jasmine did not take any steps to convey the tenements and the multi-storeyed building in favour of

the respondent no.3 - Society inspite of its registration on 27/2/1996 and on the representations made by it to the applicant no.1 - company, which became the successor of Jasmine with effect from 10/3/1993, on 28/5/2003 the applicant no.1 - Company by Deed of Lease, leased out the said four structures identified as Structure Nos.1, 2, 7 and 8 to the said Trust as was the requirement of the agreement dated 28/9/1985. These structures were to be subsequently handed over to the Respondent no.3 - Society or any other body / association of the flat owners in Gayatridham. However, contrary to the terms of the agreement dated 28/9/1985, the Trustees on the very next day i.e. on 29/5/2003 by agreement surrendered, transferred and assigned to the applicant no.1 - company their lease hold rights for the consideration mentioned in the said agreement. Consequently the applicant no.1 company obtained vacant possession of the premises occupied by four structures viz. 1, 2, 7 and 8 which in fact were not supposed to be demolished as per the agreement dated 28/9/1985 and got the plans for development of the remaining portion of the larger land sanctioned on 5/8/2003. It has constructed on the said remaining large portion of land two buildings

by name Gayatridarshan and Gayatridham Tower. The first building is claimed to be for rehabilitation of the tenants of demolished structures 1, 2, 7 and 8 and the second building is partly for rehabilitation of the tenants. This construction was allegedly objected to by the respondent no.3 - Society and the respondent nos.2 and 4 as well. Completion certificates have been issued by the Municipal Corporation in respect of the additional two buildings as well i.e. Gayatridarshan and Gayatridham Tower.

4. On 15/9/2005 the respondent no.3 filed Suit No.3712 of 2005 in the City Civil Court at Mumbai for the conveyance of the larger land and for direction and order against the Trustees of the Trust, Jasmine and the applicant no.1 - company and further prayed for direction not to act upon the Conveyance dated 22/4/2003 and for revocation of sanctioned plans and other related reliefs. On 20/10/2005 the Respondent No.3 - Society filed Suit No.2925 of 2005 on the Original Side of this Court for directions against the applicant no.1 - Company to execute all documents to effectively vest the larger land in the Society and for an order to demolish and/or hand over to the

Society the structures constructed by the applicant no.1 - Company i.e. the additional building. In Notice of Motion, ad-interim relief was refused in the said suit.

5. C.C. No. 97/SS/06 has been filed by respondent no.2 on or about 15/4/2006 under Section 13(1) of the MOFA, 1963 and Section 406 read with Section 114/115 of IPC. The learned Metropolitan Magistrate on recording the verification of the complainant was pleased to issue process only under Section 13(1) of the MOFA and the applicants are praying for quashing and setting aside the order of issuance of process. They claimed that the respondent no.2 has already filed L.C. Suit No. 3712 of 2005 before the City Civil Court at Mumbai along with a Notice of Motion for stay and in the said proceedings the reliefs in terms of directions to comply with the obligations under MOFA have been prayed and, therefore, the criminal complaint filed under the said Act does not call for any further investigations. It is further stated that all the subsequent construction has been done as per the plans approved by the respondent-corporation and the trustees have sold the

entire suit property to the applicants. On the other hand, the respondent no.2-complainant and respondent no.3-society submitted that a prima facie case for taking cognizance for the charge under Section 13(1) of the MOFA has been made out and the revision court having considered the challenge to the impugned order of issuance of process and not found any case to cause intereference, this court under Article 227 of the Constitution read with Section 482 of Cr.P.C. should not cause interference and the complaint should be allowed to be proceeded with the trial, more so when the MOFA has been framed by the State Legislature to protect the interest of the flat owners and also to ensure that they are not exploited by the builders. It was further submitted that pendency of the suit filed by the respondent no.2 is a civil liability and even if the relief in the said suit is finally granted, the offences committed by the applications within the meaning of Section 13(1) of the MOFA cannot go unpunished. The punishment for criminal offence cannot be whittled down or the trial of such complaint need not be scuttled only because a civil suit is pending, urged the learned counsel for the respondent no.3-society.

5A. The powers of this court under Section 482 of Cr.P.C. are required to be used sparingly and if a prima facie case has been made out for trial, there would be no reason to interfere with the order of issuance of process.

. Recently a three-Judge Bench of the Supreme Court in the case of Manjula Sinha vs. State of U.P. and ors. **[2007 AIR SCW 4555]** stated as under on the scheme of Section 482 of Cr.P.C. regarding the inherent powers of this court:-

(a) Section 482 of Cr.P.C. envisages three circumstances under which the inherent jurisdiction may be exercised, namely,

(i) to give effect to an order under the Code,

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of

justice.

It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction.

(b) While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the

powers court would be justified to quash any proceeding if it finds that initiation/ continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

6. In Second Appeal No. 38 of 2007 decided on 4/5/2007, this court had an occasion to examine some of the provisions of the MOFA. There is no dispute that the agreements entered between the tenants like resopndent no.2 and the applicants clearly stipulated that development scheme was undertaken under the MOFA and, therefore, the applicants were obliged to comply with the requirements stipulated thereunder. Sections 4(1A) and 7A of the said Act are reproduced as under:-

> **4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered.**
>
> (1) .....
>
> (1A). The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b)-

(a) Particulars,

(i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats.

(vi) the nature, extent and description of limited common area and facilities;

(vii) the nature, extent and description of limited common area and facilities, if any;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use for which the flat is intended and restriction on its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents, -

(i) the certificate by an Attorney-at-law or Advocate under clause (a) of sub-section (2) of section 3;

(ii) Property Card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.

7A. Removal of doubt.

For the removal of doubt, if is hereby declared that clause (ii) of sub-section (i) of section 7 having been retropsectively substituted by clause (a) of section 6 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment) Act, 1986 (hereinafter in this section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as so substituted had been in force at all material times, and the expression "or construct any additional structures" in clause (ii) of sub-section (1) of section 7 as it existed before the commencement of the Amendment Act and the expression "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorised change in the construction" in sub-section (2) of section 7 shall, notwithstranding anything contained in this Act or in any agreement, or in any judgment, decree or order of any Court, be deemed never to apply or to have applied in respect of the construction of any other additional building or structures constructed or to be constructed under a scheme or project of development in the layout after obtainig the approval of a local authority in accordance with the

> building rules or building bye-laws or Development Control Rules made under any law for the time being in force.

7. Section 7A was added to the scheme of the MOFA by Maharashtra XXXVI of 1986 consequent to the decision of this court in the case of Kalpita Enclave Co-operative Housing Society Ltd. and ors. vs. Kiran Builders Pvt. Ltd. and ors [1986 Mh.L.J. 110]. The scheme of Section 7A of the Flats Act was interpreted by this court in the case of M/s. Khatri Builders vs. Mohmed Farid Khan and ors. [1992 (1) Bom.C.R. 305] and in paras 18 and 19 therein this court held as under:-

> "18. ... If in a given case, the layout permits the construction of more building or buildings in accordance with the Building Rules and Bye-Laws, it is possible to say that there should be no impediment to the construction of additional building or buildings. While, therefore, in a given case, if on a plot of land, buildings "A" & "B" existed, which have been occupied by the flat

owners and if a third building "C" is being put up the question would be as to whether despite the third building "C" being permissible in accordance with the Building Rules and Bye-Laws, can the flat owners in Buildings A & B raise an objection. I need not go into this question in this case since I am only concerned with the question of a terrace flat being constructed on an existing structure. In my view, in the facts of this case, the insertion of section 7-A by the Amending Act 36 of 1986 would not make any difference to the ratio of the judgment of Jahagirdar,J. If, therefore, the plaintiffs have objected to the terrace flat being constructed, in my view the Civil Court would have jurisdiction to entertain the suit of the plaintiffs and the plaintiffs would be entitled for an injunction prayed for.

19. The conclusions reached above would also be in tune with the Preamble of the Ownership Flats Act and the object of

protecting the interests of the flat owners who are normally unorganised. It is for the protection of this class of persons that the Ownership Flats Act has been passed...."

. In the case of Ravindra Mutenja and ors. vs. M/s. Bhavan Corporation and ors. [2003 (3) ALL MR 521], this court referred to the earlier decisions in the case of Kalpita Enclave, Mohatta Nagar Cooperative Hsg. Sco. Ld. vs. M/s. Vishram Khimji & Sons & ors. (1994(1) Bom.C.R. 444], Down Mangor Valley Residents' Welfare Association Vs. Mormugao Municipal Council, Goa [AIR 2002 Bom. 258] and held on the scope of Section 7A of the Flats Act as under:-

"13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme

filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. **Once the building is completed and the purchases are**

put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or rules framed under MOFA is over, the permission of such purchasers would be required." (Emphasis supplied)

8. In the instant case, the flat owners, like the respondent no.2, were put in possesion in December 1989. The Corporation issued the completion/occupation certificate on 3/9/1989. The respondent no.3 - society was registered on 27/2/1996 and, therefore, it is clear, having regards to Section 7A of the MOFA that the applicants-builders were under a statutory mandate to execute the conveyance, transfer the property along with the vacant space in favour of the society before the additional construction was proposed or undertaken, in view of the agreements singed between the parties from time to time. Section 11 of the MOFA provides that the Promoter shall take all necessary steps to complete his title and convey in favour of the organisation or persons who take flats his right, title and interest in the land and execute all related documents

thereafter as per the agreement, within the prescribed period. The complainant alleges that the applicants have acted in breach of the requirements of Section 11 of the MOFA and has thus committed an offence punishable under Section 13 of the said Act. The complainant, being one of the members of the society, is entitled, on the basis of the agreement entered with the applicants, like any other member of the society to file a complaint for the offences punishable under MOFA and to take appropratie steps to get the conveyance executed in favour of the society as per Section 11 of the said Act. The applicants did not convey the tenements of Gayatridham Co-op.Hsg.Sco. under Section 11 and it is alleged that they acted in breach of the said provisions deliberately with an intention to deprive the society and its members of the ownership of the open area, car parking etc. The revision court was right in holding that the complainant is thus an aggrieved person under Section 198(1) (a) of IPC and the learned Magistrate has rightly taken cognizance of the complaint presented by him under Section 13 of the MOFA. The complaint filed by the respondent no.2 cannot be a defective complaint and the MOFA does not restricts such right only in

favour of the Co-operative Housing Society or the Association of the flat owners and Section 190 of Cr.P.C. empowers the learned Magistrate to entertain the complaint. The obligations of the present applicants can be distinguished from the obligations of the trustees, so far as the offences under the MOFA are concerned.

9. I am, therefore, satisfied that a triable case has been made out for the offence punishable under Section 13 of the MOFA against the applicants and the learned Additional Sessions Judge has rightly refused to interfere with the order of issuance of process. This petition must, therefore, fail at the threshold and the same is hereby rejected summarily. Ad-interim stay granted earlier stands vacated.

(B.H. Marlapalle,J.)